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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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APR 25 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Applications of)
RAINBOW BROADCASTING COMPANY)
For an extension of time)
to construct)
and)
For an Assignment of its)
construction permit for)
Station WRBW(TV), Orlando, Florida)

GC Docket No. 95-172
File No. BMPCT-910625KP
File No. BMPCT-910125KE
File No. BTCCT-911129KT

TO: The Honorable Joseph Chachkin
Administrative Law Judge

[REDACTED]

OPPOSITION OF PRESS BROADCASTING COMPANY, INC.
TO MOTION FOR PARTIAL SUMMARY DECISION

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April 25, 1996

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SUMMARY

Press Broadcasting Company, Inc. opposes the Motion for Partial Summary Decision submitted by Rainbow Broadcasting Company ("RBC") with respect to the financial misrepresentation/lack of candor issue in this proceeding. Summary decision is only appropriate where there is no genuine issue as to any material fact for determination at hearing. In this case, RBC's claims in support of its Motion are contradicted by multiple matters of record, including even the sworn testimony (given before the U.S. District Court in Miami in litigation initiated by RBC) of one of the persons (i.e., RBC principal Joseph Rey) on whom RBC now relies in its efforts to obtain summary decision. Far from demonstrating that there are no genuine issues of fact, RBC's Motion illustrates that there are a number of such issues. Indeed, the Motion even raises new issues concerning the credibility of RBC and its chief witness, Mr. Rey. Under these circumstances, summary decision is plainly not warranted, and RBC's Motion should be denied.

1. Press Broadcasting Company, Inc. ("Press") hereby opposes the "Motion for Partial Summary Decision" submitted in the above-captioned proceeding by Rainbow Broadcasting Company ("RBC") with particular respect to the financial misrepresentation/lack of candor issue herein. As set forth below, summary disposition of that issue is clearly unwarranted and inappropriate.

Background

2. The financial misrepresentation/lack of candor issue in this proceeding reads as follows:

To determine whether [RBC] made misrepresentations of fact or was lacking in candor with respect to its financial qualifications regarding its ability to construct and initially operate its station, in violation of Sections 1.17 and 73.1015 of the Commission's rules or otherwise.

The necessity for hearing on this issue arose from the fact that RBC chose to simultaneously advance diametrically opposite positions vis-à-vis its financial qualifications, first, in Rey v. Guy Gannett Publishing Co. (in the United States District Court for the Southern District of Florida, Judge Stanley Marcus) and second, at the Commission.

3. In Rey v. Guy Gannett Publishing Co. ("the Miami Litigation"), RBC sought a preliminary injunction to keep Press from utilizing space on the same broadcast tower specified for use in RBC's construction permit. It is important to note that RBC initiated that lawsuit, and in so doing, RBC chose to seek injunctive relief. This is important because a party seeking injunctive relief must, as an essential element of its affirmative proofs, demonstrate that it will suffer "irreparable

harm" absent the relief. Thus, by electing to seek injunctive relief, RBC voluntarily assumed the essential, affirmative burden of demonstrating that it would be "irreparably harmed" if the requested injunction were denied.

4. RBC sought to make that showing by asserting that, absent the injunction, RBC

will not be able to secure the financing to build a television station for Channel 65 on the Bithlo tower or any other tower in the area.

* * *

No financing will be available to build and operate the station, given that it is not economically viable, and the station will never be built.

RBC's Complaint in the Miami Litigation, Attached Statement of Susan Harrison, at 2, 3 (copies of relevant pages included as Attachment A hereto) (emphasis added). ^{1/} Thus, it was RBC itself which, by seeking injunctive relief, assumed the burden of establishing "irreparable harm", and it was RBC which then attempted to meet that burden by raising clear and unequivocal questions concerning RBC's financial qualifications to construct and operate the station.

5. RBC's efforts to obtain a preliminary injunction in the Miami Litigation began on November 2, 1990 and continued until June, 1991 (when Judge Marcus denied the requested relief). In

^{1/} Ms. Harrison's quoted statements were included in a Statement which was submitted as an attachment to RBC's Complaint in the Miami Litigation. Ms. Harrison's statement was specifically and expressly incorporated by reference into RBC's Complaint. The Complaint was signed by RBC principal Joseph Rey. See Attachment A hereto.

January, 1991 -- at precisely the same time that RBC was seeking injunctive relief in Miami based on the claim that, if Press were to be allowed on the tower, RBC would not be able to construct and operate its station -- RBC filed with the Commission its Fifth Extension Application seeking extension of its permit. In that application RBC expressly represented to the Commission that RBC was, at that point, "ready, willing and able to proceed with construction." See Attachment B hereto (copy of Exhibit 1 to RBC's Fifth Extension Application).

6. In February, 1991, Press brought to the Commission's attention the obvious inconsistency between RBC's claims concerning its financial situation. In response, RBC declined to explain or justify the inconsistency. RBC also made no substantive attempt to demonstrate to the Commission that, notwithstanding RBC's statements in the Miami Litigation, RBC might still be financially qualified within the meaning of the Commission's understanding of that concept. ^{2/}

7. In November, 1991, RBC filed its above-captioned assignment application ("the 316 Application") proposing to assign its permit to Rainbow Broadcasting, Limited ("RBL"). In opposition, Press noted that the 316 Application appeared to be

^{2/} To avoid the claim that Press is mischaracterizing RBC's response, Press is including, as Attachment C hereto, a copy of RBC's March 12, 1991 Opposition to Press' Petition for Reconsideration relative to RBC's Fifth Extension Application. As far as Press can tell, the only discussion relative to Press' arguments about RBC's financial qualifications appears at page 7 of that Opposition, where RBC merely dismisses Press' claims as "speculation" and "surmise". RBC's pleading, though, will speak for itself.

an effort by RBC to establish some new financing mechanism, even though RBC had not theretofore ever demonstrated that it had any established financing at all (and, indeed, Judge Marcus had found just five months earlier that RBC in fact had no financing at all). Press renewed its assertion that RBC was not financially qualified.

8. In response to Press, RBC again failed to provide one iota of information in support of the notion that, absent grant of the 316 Application, RBC might be financially qualified. A copy of RBC's response (filed January 30, 1992) is included as Attachment D hereto.

9. In March, 1993, the Commission's staff wrote to RBC, inquiring about the status of construction. RBC responded by letter (with accompanying statement of Mr. Rey) on April 12, 1993. A copy of that response is included as Attachment E hereto. ^{3/} In his statement, Mr. Rey advised the Commission that

[u]ntil the [316 Application] is acted upon, [RBC] cannot use the limited partnership funds to effect construction.

* * *

In order to go forward, [RBC] requires favorable action on [inter alia, the 316 Application].

This notion was echoed by RBC a month later when RBC advised the Commission that RBC

^{3/} The Presiding Judge will note that, while a copy of the staff's letter of inquiry was served on Press, RBC's response was not.

remains precluded from constructing because it cannot utilize the limited partnership funds; it cannot utilize the limited partnership funds because it cannot transfer the construction permit to the limited partnership; and it cannot transfer the permit unless it has a valid construction permit.

See Attachment F hereto (copy of RBC pleading filed May 13, 1993). And RBC continued this refrain in its July 2, 1993 Petition for Reconsideration and Reinstatement and Grant of Application for Assignment of Construction Permit (at pages 7-8 - copy included as Attachment G hereto).

10. For its part, RBL joined in this position when, in its Intervenor's Brief to the Court of Appeals in Press Broadcasting Co., Inc. v. FCC, RBL stated that

[RBC] reiterated [in its petition for reconsideration to the Commission] the fact that completion of construction was delayed only by Commission inaction on its still pending request to change from a general to a limited partnership and use equity rather than debt financing for its construction.

See Attachment H hereto (copy of relevant pages of RBC Intervenor's Brief).

11. Thus, despite the fact that, for more than four years (from February, 1991 to July, 1995), Press had consistently raised questions concerning RBC's financial qualifications -- questions arising from RBC's own statements in the Miami Litigation -- RBC at no point even attempted to demonstrate that it was in fact financially qualified.

Argument

12. Summary decision is warranted only when there is no genuine issue as to any material fact for determination at

hearing. 47 C.F.R. §1.251. This is a heavy burden for a moving party to meet, especially when the issue involves the question of intent, a question which is inherent in the financial misrepresentation/lack of candor issue in this proceeding. See, e.g., Weyburn Broadcasting Ltd. Partnership v. FCC, 984 F.2d 1220 (D.C. Cir. 1993).

13. RBC seeks to meet its burden by ignoring all of the history of this proceeding related above, and by instead introducing onto the Commission's stage a new character with a new script.^{4/} According to RBC, RBC has been relying consistently on a financial commitment from one Howard Conant, who supposedly made the commitment to RBC at some unspecified time prior to 1991 and who -- despite intervening setbacks in the marketplace, apparent lack of substantive discussion, serious illness on Mr. Conant's part, and a complete lack of documentation -- supposedly remained firmly committed at all times relevant hereto, at least so far as RBC now says it believed.

14. Press acknowledges that this is not the first time that Mr. Conant's name has arisen (although it is the first time that RBC has voluntarily mentioned it at the Commission). In the Miami Litigation, Mr. Rey was cross-examined with respect to RBC's claims of irreparable harm. Mr. Rey identified Mr. Conant as "an investor" with whom RBC had some unwritten "agreement".

^{4/} The introduction of this new character to RBC's *dramatis personae* also necessitated a number of re-writes to Mr. Rey's script, as discussed in the text, infra.

See Attachment I hereto (copies of relevant portions of transcript of Mr. Rey's testimony). But the discrepancies between the 1991 and 1996 versions of the RBC/Conant relationship alone are sufficient to demonstrate that RBC's Summary Decision Motion raises more questions than it answers, and thus cannot be granted.

15. Let us compare and contrast RBC's story as related by Mr. Rey, under oath, in the Miami Litigation versus the story RBC is advancing to the Presiding Judge in its Summary Decision Motion.

16. In both versions, Mr. Conant supposedly entered into an agreement to provide RBC approximately \$4 million. In both versions, that supposed agreement -- which RBC now would have the Commission believe was the sole basis for RBC's financial qualifications at all times relevant hereto -- was unwritten. In neither version does RBC provide any particular date for the supposed agreement: in the Miami Litigation, Mr. Rey stated that the "agreement" had been struck at some point in late 1990, i.e., "in the last few months" prior to Mr. Rey's January, 1991 testimony, id.; in his statement submitted with RBC's Summary Decision Motion, Mr. Rey does not provide any specific (or even quasi-specific) timeframe; for his part, Mr. Conant (in a statement also submitted with the Summary Decision Motion) sticks to the same vague script, indicating only that his supposed financing commitment "preceded 1991". Thus, the best we can say is that the RBC/Conant "agreement" apparently arose sometime in

the last few months of 1990 -- very shortly before Mr. Rey's January, 1991 testimony.

17. In that testimony, Mr. Rey provided virtually no details concerning the terms of the "agreement". But when asked whether Mr. Conant had been provided any security or collateral for his financing commitment, Mr. Rey stated, "Yes. A minority participation in the station." Id. When asked whether that meant that Mr. Conant wanted to be a "minority shareholder of your partnership", Mr. Rey responded, "Correct". Id.

18. But what a difference five years make in the powers of one's recollection! Now, in their well-choreographed statements submitted with the Summary Decision Motion, Messrs. Rey and Conant are supposedly able to recall that the supposed agreement really didn't involve any such potential ownership interest at all. Rather, the supposed agreement featured elaborate and detailed payments to Mr. Conant of a percentage of "positive cash flow" (the percentage varying over the years). Additionally, Mr. Conant was supposedly entitled to a percentage of the net sales price if the station were to be sold. And Mr. Conant was also to receive not only a security interest in the station's assets, but also the personal guarantees of Mr. Rey and his fellow principal, Letitia Jaramillo.

19. The trouble with this revised script is that it conflicts with Mr. Rey's January, 1991 testimony, which was far more contemporaneous with the supposed agreement and, therefore, more likely to reflect the nature and terms of any agreement

which might actually have been discussed at that time. Mr. Rey was asked about security or collateral terms. The only thing he mentioned was Mr. Conant's supposed interest in acquiring a "minority participation in the station". What about the percentage of cash flow? What about percentage of the purchase price, if the station were sold? What about the security interest in the station's equipment? And what about Mr. Rey's own personal guarantee of a supposed \$4,000,000 loan -- how could that have slipped Mr. Rey's mind in January, 1991? The current version of the supposed RBC/Conant agreement, while rich in detail, is clearly not credible when measured against Mr. Rey's previous, more contemporaneous, sworn testimony.

20. Of course, in that testimony Mr. Rey did mention a possible ownership interest which Mr. Conant might receive. That possible interest is no longer with us: Mr. Rey now asserts that his 1991 answer was wrong, that he and Mr. Conant never really had any understanding about an "equity position" for Mr. Conant. What happened to it? According to Mr. Rey, Mr. Rey merely "misunderstood" the questions that were asked of him during his 1991 testimony.

21. This claim of "misunderstanding" is truly stunning. It is especially so in view of the fact that Press, in its various pleadings beginning as early as February, 1991, repeatedly pointed to that particular portion of Mr. Rey's testimony, noting the apparent promise of a potential ownership interest in RBC which had not been disclosed to the Commission (in apparent

violation of Section 73.3613 of the Rules). See, e.g., Press Informal Objection (filed February 15, 1991) at 15 (copy included as Attachment J); Press Informal Objection and Request to Hold Application in Abeyance (filed January 7, 1992) at 4-5 (copy included as Attachment K). As a result, the attention of both RBC and Mr. Rey was directed to that particular portion of his testimony repeatedly over the last five years. At no time did RBC or Mr. Rey seek to correct or modify that testimony.

22. The silence of RBC and Mr. Rey in this regard is similar to another aspect of their position over the last five years. As noted above, Press has, since February, 1991, consistently alleged that RBC was not financially qualified. For its part, RBC has had numerous opportunities to demonstrate -- to both Press and to the Commission (and even to the Court of Appeals) -- that Press' allegations have been unfounded. And yet, for the past five years RBC has declined even to mention Mr. Conant, much less to bring him out on stage for public review. This was even true in July, 1993, after RBC's applications had been denied and dismissed by the Video Services Division. One would have thought that, in its Petition for Reconsideration of that decision, RBC would have made darned sure that it was providing the Commission the most solid possible basis on which to conclude that grant of the RBC applications was warranted. But lo and behold, RBC's Petition for Reconsideration does not mention Mr. Conant or his supposed agreement! The failure of RBC and Mr. Rey at any prior point in the years-long

history of this case to raise or address the matters on which it centrally relies in its Summary Decision Motion underscores the unreliability of RBC's new-found claims.

23. And finally, the silence of RBC and Mr. Rey relative to these various points parallels the failure of RBC to construct its station at any time during the period 1991 through 1993. If, as RBC now asserts, RBC was relying on Mr. Conant's supposed agreement, why did RBC not avail itself of that "agreement", construct its station, and prove to the world that it was financially qualified? Why did RBC instead advise the Commission in 1993 that RBC was precluded from constructing because the supposed limited partnership funds were not available for use? ^{5/}

24. There are other discrepancies between what the historical record shows and what RBC's revised version purports to show. ^{6/} Suffice it to say that, contrary to RBC's entirely

^{5/} RBC's failure to construct, and its insistence that that failure was attributable to the non-availability of limited partnership funds, are particularly bizarre in view of RBC's claims now that Mr. Conant's "agreement" included some provision which would have permitted RBC to utilize Mr. Conant's supposed loan as a kind of bridge financing to be re-paid upon the formation of RBL. If such a provision were really in place, then why did RBC repeatedly claim that it could not construct absent grant of the 316 Application?

^{6/} For example, in an obvious effort to suggest that RBC really did consistently rely on Mr. Conant's supposed loan commitment, Mr. Rey (in his statement accompanying the Summary Decision Motion) claims that at no time did Mr. Conant "withdraw his commitment". From this, RBC concludes that RBC can now claim that it consistently, and justifiably, relied on that supposed loan commitment. The trouble with that notion is that it is contradicted by Mr. Rey's own January, 1991 testimony in the
(continued...)

self-serving claims, the showing which accompanies its Summary Decision Motion is of extremely questionable reliability. Indeed, when RBC's showing is compared with the available record of this case, that showing itself raises serious questions about RBC's honesty. After all, the primary support offered by RBC for its Summary Decision Motion is a statement of Mr. Rey. But, as discussed above, in that statement Mr. Rey contradicts earlier sworn testimony by himself, and declares other aspects of his earlier testimony inoperative because it was supposedly based on some "misunderstanding" by him. Such a cavalier approach to sworn testimony puts Mr. Rey's own credibility in serious question. How, if he is willing now to ignore, contradict, or simply declare earlier statements "misunderstandings", can we know that at some future time he won't do the same for his current statements? Where a witness appears to have spoken out of both sides of his mouth, it is often (if not always) impossible to determine which, if either, version bears any resemblance to the truth. Certainly that determination cannot

^{6/}(...continued)

Miami Litigation. Mr. Rey repeatedly testified that, while RBC supposedly had some kind of agreement with Mr. Conant, "everything was put on hold" as a result of the Miami Litigation. See Attachment I hereto (pages ____). Upon further questioning on this point, Mr. Rey testified that Mr. Conant "has told me if [Press] gets on that tower, the likelihood is that he will not finance the station." *Id.* (emphasis added) This testimony reflects obvious, contemporaneous, and understandable doubt as to the availability of financing from Mr. Conant -- doubt which, of course, constituted a pivotal aspect of RBC's Miami Litigation. Under the circumstances it is difficult to take seriously RBC's latterday, self-serving attempt to script a different version of the story more conducive to RBC's current needs.

and should not be made on the basis of whatever self-serving written statements the witness may have made most recently. And yet, that is what RBC seeks in its Summary Decision Motion.

25. Resolution of the many questions mentioned above, and the designated issue itself, is likely to require the weighing of disputed inferences and credibility determinations, which may be made only by the Presiding Judge through the full hearing process. In such cases, summary disposition is simply not appropriate as a general rule. See, e.g., Weyburn Broadcasting, supra. And, as discussed above, summary decision is clearly not warranted in light of the available record of this case. Rather, this case should proceed to discovery and then to hearing, so that a full and complete record may be developed herein.

WHEREFORE, for the reasons stated, Press Broadcasting Company, Inc. opposes the Motion for Partial Summary Decision submitted by Rainbow Broadcasting Company.

Respectfully submitted,


/s/ Harry F. Cole
Harry F. Cole

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Counsel for Press Broadcasting
Company, Inc.

April 25, 1996

ATTACHMENT A

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT, IN AND
FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.

JOSEPH REY, LETICIA JARAMILLO,
and ESPERANZA REY-MEHR, as General
Partners of RAINBOW BROADCASTING
COMPANY, a Florida Partnership,

90-54033

Plaintiffs,

vs.

GUY GANNETT PUBLISHING CO., Individually,
GUY GANNETT PUBLISHING CO., doing business
as GANNETT TOWER CO., GUY GANNETT PUBLISHING
CO., doing business as BITHLO TOWER COMPANY,
GANNETT TOWER COMPANY, Individually, MPE
TOWER, INC., Individually and GANNETT TOWER
COMPANY and MPE TOWER, INC. as General Partner
and copartners doing business as
BITHLO TOWER COMPANY, a Florida General partnership.

Defendants.

**VERIFIED COMPLAINT
FOR SPECIFIC PERFORMANCE AND OTHER RELIEF
FBN: 026955**

Plaintiffs, JOSEPH REY, LETICIA JARAMILLO and ESPERANZA REY-MEHR, as General Partners of RAINBOW BROADCASTING COMPANY, a Florida Partnership, sue Defendants, GUY GANNETT PUBLISHING CO., Individually, GUY GANNETT PUBLISHING CO., doing business as GANNETT TOWER CO., GUY GANNETT PUBLISHING CO., doing business as BITHLO TOWER COMPANY, GANNETT TOWER COMPANY, Individually, MPE TOWER, INC., Individually and GANNETT TOWER COMPANY and MPE TOWER, INC. as General Partners and as copartners doing business as BITHLO TOWER COMPANY, a Florida General partnership and alleges:

EXHIBIT 1

LAW OFFICES OF FROMBERG, FROMBERG AND LEWIS, P.A.

MIAMI, FLORIDA

MALLANDALE, FLORIDA

No. 94-1439

JA 47

Plaintiff/Tenant claims exclusive use and occupancy. Defendant/Landlord intends to enter into a lease with a competitor of the Plaintiff for the antenna space reserved exclusively for the Plaintiff, and to allow such prospective tenant to immediately erect an antenna and to commence construction of a transmission building. The prospective tenant is Press, an existing independent TV station in the Orlando area which seeks to expand or shift its marketing area so as to compete directly with the marketing area to be covered by the Plaintiff, since both the Plaintiff and Press would be on the same height on the tower and thus would have the identical transmission capabilities. If Press is allowed to transmit from this site, it will render Plaintiff's permit valueless. See Affidavit from Susan Harrison attached hereto and made a part hereof as Exhibit "B". If Press is not allowed on the top slot, it can still transmit from its present location and will suffer no harm.

28. Plaintiff has paid rent for almost five years in order to preserve the exclusive use of the "top slot" on the Tower and assure its viability, even though it was not actually transmitting from said Tower.

29. Plaintiff is now prepared to build and place its antenna on its "top slot" on the Tower and to commence construction of the transmitter building on Defendant's premises in accordance with its Lease. However, Plaintiff's permit for Channel 65 to transmit from the Tower is not a viable business opportunity for Plaintiff if, in fact, Defendant/Landlord is permitted to place additional TV

antennas within the "top slot" preserved by and leased to the Plaintiff.

30. Defendant/Landlord's damages, in the event that a temporary and permanent injunction is wrongfully issued, is solely its loss of potential additional lease payments. On the other hand, the injury to the Plaintiff/Tenant should Press occupy the same "top slot" and its aperture on the Tower, is irreparable since it would no longer make any business sense for Plaintiff/Tenant to proceed to go on the air. In effect, five years of litigation expenses and lease payments on the part of the Plaintiff/Tenant to protect its permit and its exclusive "top slot" on a centrally located Tower, with no more TV stations being licensed by the FCC in that area, would have been for naught.

WHEREFORE, Plaintiff/Tenant moves this Court for the entry of a temporary injunction preventing Defendant/Landlord from leasing any space on the Tower within the aperture of the top slot to any other TV station, and for the issuance of a permanent injunction containing the same prohibition and compelling Defendant/Landlord to permit Plaintiff/Tenant to immediately start to build on Defendants' Tower.

RAINBOW BROADCASTING COMPANY,
a Florida Partnership

By: Joseph Rey
JOSEPH REY General Partner

STATE OF FLORIDA)
) ss.
COUNTY OF DADE)

BEFORE ME, the undersigned authority, this day personally appeared JOSEPH REY, as General Partner of RAINBOW BROADCASTING

STATEMENT OF SUSAN D. HARRISON

Susan D. Harrison, having been duly sworn, upon oath states the following:

I am a Principal in Harrison, Bond & Pecaro ("HB&P"), Washington, DC, a consulting firm specializing in financial and economic analyses for the communications industry.

Since 1974, I have been responsible for the preparation of approximately 1,000 analyses of radio and television stations, cable television systems, and other electronic communications media. In many of those cases, I was called upon to make revenue and expense forecasts for new entities just starting up, and to provide an opinion as to their ultimate economic viability.

I have rendered expert testimony in more than thirty proceedings before the Federal Communications Commission and in United States District Court.

The Engagement

I have been retained by Rainbow Broadcasting Company¹ ("Rainbow"), permittee of television channel 65, Orlando, to prepare an analysis of the effect on Rainbow Broadcasting of Gannett Tower Company ("Gannett") allowing Press Broadcasting Company ("Press") to locate its television transmitting antenna in the top slot and its aperture on the broadcast transmitting tower located at Bithlo, Florida, and owned and operated by Gannett.

Summary of Opinion

It is my opinion that if Gannett takes this action, Rainbow Broadcasting will suffer irreparable harm. Specifically, Rainbow's television station on Channel 65, licensed to Orlando, will be rendered worthless. Rainbow will be unable to secure financing to build and operate the station and will be left holding a Construction Permit that has no value on the open market today or for the foreseeable future.

¹ Neither I, nor Harrison, Bond & Pecaro, nor any other employees thereof, have any personal interests in the outcome of this matter.

EXHIBIT B

Data Sources Relied Upon

In coming to these opinions, I have reviewed and relied upon the following documents: The Broadcasting Yearbook; The Television Factbook; Arbitron Ratings; NAB Financial Data for TV Markets; NAB Financial Data for TV Stations; CACI, Inc., Database; Revenue and Expense Projections for Channel 65 Prepared by Rainbow Management; and a Summary of Costs Incurred by Rainbow Resulting in the Grant of the Television Channel 65, Orlando, Construction Permit by The FCC and the Subsequent U. S. Supreme Court Affirmation of that FCC Decision.

A. Irreparable Harm - The Construction Permit for the Television Station on Channel 65 Will Be Rendered Worthless Both Today and For the Foreseeable Future

If Gannett allows Press to broadcast from the top slot and its aperture on the Bithlo tower, Rainbow's ability to compete in the Orlando television market will be obstructed to the point that it will not be able to secure the financing to build a television station for Channel 65 on the Bithlo tower or any other tower in the area.

This opinion is based on the following:

1. There are currently four television stations (all of which are currently affiliated with a network) operating from a centrally-located transmitter site in the Orlando area. That market can only accommodate five television stations, i.e., one additional station. Any more stations would not be economically viable since they would not achieve minimum share levels required for buyers of television advertising time.
2. Rainbow was positioned on the Bithlo tower to be the fifth station operating from that central market location.
3. Press's entry on the same slot on the Bithlo tower as currently leased to Rainbow would create two television stations where only one additional station can economically survive on that site.
4. Rainbow will not generate a sufficient viewing audience to achieve minimum share levels required by buyers of television advertising time;
5. Rainbow's revenues (if Press is in their slot) will not offset its operating expenses, capital expenditures, and financing costs;

6. Rainbow will not have a re-sale value on the open market equal to the original cost of building the station and covering its expense short-falls.
7. Rainbow will no longer be economically viable.
8. No financing will be available to build and operate the station, given that it is not economically viable, and the station will never be built.

B. Investment Criteria in the Broadcasting Industry

Investors in broadcast properties evaluate opportunities presented to them using standard financial analysis techniques. Simply put, the investor considers whether the project can reasonably be expected to return him his required rate of return. If it can, and assuming other basic criteria are met, he is likely to go forward with the investment.

In the case of Rainbow, the material change that will result from Gannett permitting Press to occupy the top slot and its aperture on the Bithlo tower is that Rainbow will not be able to attract a sufficient viewing audience to achieve minimum share levels required by buyers of advertising time.

C. Rainbow/Channel 65's Loss of Fair Market Value

For all practical purposes, if Gannett allows Press to occupy this slot, Rainbow's audience- and revenue-generating capability will be effectively destroyed. Instead of garnering a required minimum (for viability purposes) 4% to 5% audience share, Rainbow will probably attract no more than 2% of the market's audience. As such, it would have no opportunity to sell advertising time to national advertisers.

D. Conclusion

Effectively, if Gannett allows Press to mount its antenna in the top slot and its aperture of the Bithlo tower, Rainbow will have endured eight years of litigation only to find that its television station can never be built since it has no fair market value on the open market today or in the foreseeable future.

Further affiant sayeth not.

Harrison, Bond & Pecaro

By Susan D. Harrison
/Susan D. Harrison

Sworn to and subscribed before me this 2nd day of November, 1990,
in the District of Columbia.

M. Dee English
Notary Public

My Commission expires: My Commission Expires November 30, 1992

ATTACHMENT B